# IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

**COMPANY APPLICATION No. 254 of 2003**
**In**
**COMPANY PETITION No. 177 of 1996**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE JAYANT PATEL**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**BANK OF BARODA - Applicant(s)**

**Versus**

**O.L. OF ASTRON DRUGS & INDUS. LTD. & 5 - Respondent(s)**

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**Appearance :**
MR KM PARIKH for Applicant(s) : 1,
MR PH PATHAK for Respondent(s) : 1,
OFFICIAL LIQUIDATOR for Respondent(s) : 1,
NOTICE SERVED BY DS for Respondent(s) : 2 - 3, 6,
MR HM PRACHCHHAK for Respondent(s) : 4,
MR PRAKASH K JANI for Respondent(s) : 5,
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**CORAM : HONOURABLE MR.JUSTICE JAYANT PATEL**

**Date : 10/10/2005**

**ORAL JUDGMENT**

1.Heard the learned Counsel appearing for both the sides

finally.

2. The present application is preferred for declaration of the sale as invalid and consequently the applicant has also prayed for the relief directing the Respondent No.5 to surrender and hand over the possession of the property bearing Survey No.1447/4 admeasuring 6164 sq. Mtrs. Situated at Rajpur Kadi, District Mehsana.

3. Upon hearing the learned Counsel appearing for the application, O.L., Mr.Jani, learned Counsel for Respondent No.5, who is the purchaser of the property and Mr.Pathak, learned Counsel for the workmen, it appears that as per the applicant Bank, the total area of the property admeasuring 17604 sq., mtrs., including the construction, plant and machinery thereon of the Company in liquidation was mortgaged with the applicant Bank. As per the applicant, the charge is also registered under the Companies Act for the amount of Rs.2.55 crore. It appears that the applicant Bank initiated the proceedings for recovery of the amount before the Debts Recovery Tribunal (DRT) and ultimately in the said proceedings of DRT in O.A. No.46 of 1999, Recovery Certificate has been issued in favour of the applicant Bank of Rs.3 crore. It also appears that the proceedings for winding up of the Company in

liquidation were initiated before this Court in Company Petition No.177 of 1996 and in the said proceedings on 17.1.2001 this Court (Coram: K.R.Vyas, J.) passed the order of winding up of the Company and Official Liquidator was performing his duty as Provisional O.L., was appointed as O.L. With all the powers under the Companies Act to deal with the assets and properties of the Company in liquidation.

4. It also appears that in the meantime, respondent No.6 workman had raised some dispute before the Labour Court under the provisions of the Industrial Disputes Act and in the said proceedings the order was passed by the Labour Court, Kalol on 4.11.1999, whereby the company in liquidation was ordered to pay the salary of Rs.58,500/- plus bonus, total Rs.66,300/- As the amount was not paid, Respondent No.6 workman had for recovery of the amount preferred Special Civil Application No.1295 of 2000 for directing the District Collector to recover the amount in pursuance of the Certificate issued by the Labour Court. In the said proceedings of Special Civil Application, as per the case of Respondent No.5 the pendency of the winding up proceedings were brought to the notice of this Court. However, as per the order dated 3.5.2000 the statement

was made by the learned AGP that the amount shall be recovered as per the recovery certificate within a period of three months from the date of receipt of the copy of the order. Thereafter, it appears that, in pursuance of the order passed by this Court of recording the statement and of taking steps for recovery of the amount, the Revenue Authority proceeded for recovery of the amount as per the Bombay Land Revenue Code read with the Rules. The auction was held and out of the properties of 17,604 sq., mtrs., property admeasuring 6164 sq., mtrs., is sold as per the said auction to Respondent No.5 for Rs.1,05,000/-. It also appears that thereafter in pursuance of the aforesaid auction on 3.1.2003, the sale deed has been executed in favour of Respondent No.5, which is registered vide Registration No.2 and at this stage the applicant Bank has approached this Court by filing the application in the month of May 2003, seeking the above referred prayer in the present application.

5. Section 536 of the Companies Act (hereinafter referred to as “the Act”) reads as under:

> “536. **Avoidance of transfers, etc., after commencement of winding-up.**
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> (1) In the case of a voluntary winding up, any

transfer of shares in the company, not being a transfer made to or with the sanction of the liquidator, and any alteration in the status of the members of the company, made after the commencement of the winding up, shall be void.

(2) In the case of a winding up by (the Tribunal), any disposition of the property (including actionable claims) of the company, and any transfer of shares in the company, or alteration in the status of its members, made after the commencement of the winding up, shall, (unless the Tribunal) otherwise orders be void."

6. Therefore, in view of the aforesaid statutory provision any disposition of the property after the commencement of the proceedings of winding up shall be void unless the Court otherwise orders. The proceedings of winding up are deemed to have commenced from the date of petition if subsequently the order of winding up is passed by the Court.

7. As observed earlier, the winding up petition was filed in the year 1996 being Company Petition No.177 of 1996 and, therefore, the proceedings can be said to have deemed commenced from 1996 onwards. There is also no dispute on the point that the order of winding up is

passed. Therefore, on the plain application of Section 536(2) of the Act, the transaction may be treated as void.

8. However, Mr.Jani, learned Counsel appearing for the Respondent No.5 contended that in view of the exceptional circumstances that this Court in exercise of power under Article 226 of the Constitution of India, had directed for recovery and that the Bank was aware about the proceedings of auction, and that the Respondent No.5 is a bonafide purchaser, in view of the synopsis given by Respondent No.5 in the affidavit-in-reply, this Court may consider the matter for declaration of the sale as valid and the same may not be declared as invalid or void.

9. The aforesaid contention of Mr.Jani deserves consideration. There is no material produced on record by the applicant to show that Respondent No.5 is not a bonafide purchaser. It also appears that on factual aspects of existence of the order passed by the Labour Court for recovery of the amount, there is no dispute. However, this Court in exercise of the power under Article 226 of the Constitution in the writ proceedings had only directed for recovery of the amount as per the recovery certificate and thereby it cannot be said that in the proceedings of Special Civil Application No.1295

of 2000, this Court directed for recovery of the amount even if it was not in law permissible without leave of the Company Court, in any case, by disposal of the property which in the present case is the land admeasuring 6164 sq., mtrs. There is no material produced on record to show that when the auction sale was conducted, it was brought to the notice of the Revenue Officers that there is an order passed by this Court for winding up of the company. As such, the first date of auction is 21.11.2000 and on that date, winding up order was also not passed, since on 17.1.2001, the order of winding up is passed. The pertinent aspect is the Condition No.4 of auction which provided that within a period of one year after payment of the amount, the land can be received back by the company as per the circular dated 29.1.1981 of the State Government. Further, it appears that the O.L., had and has not taken over the possession of the property because of the pendency of the proceedings before the Debts Recovery Tribunal and appointment of the Receiver by the DRT as per the order dated 22.2.2001. However, on the date when the registered sale deed was executed on 3.1.2003, the order of winding up is already passed and the right can be said to have been vested in favour of Respondent No.5 as per

the said registered sale deed qua the land in question. Further it appears that on the date fixed for auction even the auction proceedings were not concluded and the auction proceedings came to be concluded only on 29.12.2001 and at that time, the order of winding up was also passed. There is also no dispute on the point that Respondent No.5 has paid the amount of Rs.1,05,000/- and has also incurred expenses for conveyance deed which is reflected in the registered sale deed, copy whereof is produced at Annexure “I” with affidavit-in-reply of respondent No.5. The Respondent No.5 has also stated in the affidavit-in-reply that he has incurred expenses for purchase of the land and thereafter but, no details are given for incurring of the expenses other than that of auction price, stamp duty, etc., which are reflected in the registered sale deed, except the bare statement in affidavit-in-reply by him that he has spent huge amount amount for developing the land as stated in para 4 of the said affidavit-in-reply.

10. Therefore, it appears that Respondent No.5 has the basis for claiming the status as bonafide purchaser of the property but thereby the rights of the Bank as a mortgagee over the property cannot be allowed to be frustrated creating the situation that the Bank would

not be in a position to recover any amount from the property which is purchased by respondent No.5. The interest is created in favour of the mortgagee and even if Respondent No.5 has purchased the property, the same will be with the security interest of the secured creditors. In normal circumstances, when any person has purchased the property, which is mortgaged to any secured creditor, the secured creditor may be in a position to enforce the security interest. However, since that stage has up till now not reached, it may not be necessary to examine the said aspect in detail but at the same time the action of Respondent No.5 appears to be prima facie bonafide and, therefore, even if the provisions of Section 536(2) are to be considered and to be enforced, at the instance of the applicant Bank, a situation cannot be created which results into putting respondent No.5 at peril without there being any fault on his part consequently resulting into loss for payment of the amount and incurring of the expenses for purchase of the property etc. It also appears to some extent the applicant Bank has not resorted to appropriate remedy well in time. Therefore, considering the facts and circumstances, even if this Court is to consider the matter for declaration of the sale as invalid, it would be for the

applicant Bank to compensate Respondent No.5 by paying the consideration and other expenses which have been incurred by respondent No.5 and also a reasonable interest at the rate of 12% per annum from the date of parting with the money till the actual refund. I am inclined to take such view because out of the total area of the property admeasuring 17604 sq., mtrs., the portion over which the factory was situated and adjacent area, is of 6164 sq., mtrs., which has been sold to Respondent No.5 and, therefore, if the said area is excluded of the factory premises and the land below the same, it may not be possible for the secured creditors or O.L., as to case may be, to realize the dues in the best possible manner. If the properties are to be sold out right in the process of winding up even while realizing the interest of the secured creditors, it would be more convenient if the whole property including the area admeasuring 6164 sq., mtrs., over which the factory is situated is sold. The same would on the contrary enable the secured creditors to realize the maximum money from the properties of the Company as against the amount to be paid to respondent No.5 for refund and for compensating the other losses as referred to herein above.

11.It is needless to state that any expenses which may be

paid by the applicant Bank to receive the rights, if any, of the respondent No.5 can be treated as the expenses for winding up, since during the process of winding up, it has come to the notice of the Court that the property is already disposed of even prior to O.L., takes over the possession of the property, but after the commencement of the proceedings of winding up.

12. In the event the applicant is not ready to pay the amount for relieving Respondent No.5 from the property in question, it cannot be said that there will not be any enforcement of the provisions of Section 536(2) of the Act. It appears that even if the O.L., is to take over the property and to undertake the process for disposal of the properties of the company in liquidation, the Company Court may examine the issue at a stage when the auction of the whole properties admeasuring 17604 sq., mtrs., of the company in liquidation is held, and at that stage respondent No.5 may submit his offer if he so desires to purchase the whole of the property including the area of 6164 sq., mtrs., with the condition for treating the area of 6164 sq., mtrs., separately as the Court may deem it proper, considering the facts and circumstances that he may not be put to peril for no fault on his part. However, if there is no offer by Respondent No.5 for purchase of

whole of the property, admeasuring 17604 sq., mtrs., of the company in liquidation, as indicated herein above, then also the Company Court while considering the offer of the other offerers may provide for conditions to pay the amount of Rs.1,05,000/- plus expenses of sale deed, stamp duty, etc., plus reasonable interest from the date of parting of the amount till the actual refund by making special provisions for respondent No.5. I find it proper to leave the matter at that stage on the said aspects and suffice it to say that the Court at that stage may consider for taking interest of respondent No.5 for refund of the amount and the expenses and also for compensating the loss cost to him.

13. In view of the aforesaid, the sale of the land admeasuring 6164 sq., mtrs., vide registered sale deed No.2282 dated 3.1.2003 of the property of the company in question in favour of respondent No.5 shall be void only on condition that:

(a) the applicant Bank, within a period of three months from today, pays the amount of Rs.1,05,000/- plus expenses of the stamp duty incurred by respondent No.5 and other expenses on the production of proper proof by respondent No.5 to the applicant Bank. It is clarified that it would be open to respondent No.5 to communicate

the exact amount of expenses incurred by him for purchase of the land together with the proof of the expenses in addition to the expenses of Rs.1,05,000/- and the stamp duty, the registration charge of the documents, etc.

(b) the applicant Bank shall also pay the interest at the rate of 12% p.a., from the date on which the amount is deposited with the concerned authority by respondent No.5 till the actual payment by the applicant to respondent No.5. Such interest shall accrue only on the expenses of the consideration of Rs.1,05,000/-, stamp duty and registration charge.

(c) it is clarified that the applicant shall be at liberty to claim the aforesaid amount in priority at the time of disbursement of the amount after disposal of the property of the company in liquidation. Further, the amount which may be paid by the applicant to Respondent No.5, shall also be included in the claim of workmen dues under Section 529A of the Act for pari passu payment and consequential effect shall be given at the time of disbursement also treating the amount already paid towards workmen claim.

Alternatively, upon the compliance of the condition that:

(a) respondent No.5 is refunded the amount of Rs.1,05,000/- plus stamp duty expenses plus registration charges with interest at the rate of 12% p.a., from the date of parting of the amount until the actual refund and the expenses incurred by showing the authenticated proof for such expenses, which may be ordered to be paid/disbursed by this court while undertaking process for sale or disposal of the property of the company in winding up. Further, same will be the situation as indicated in earlier para 13(c) to such payment while giving effect to Section 529A of the Act.

14.The application is allowed to the aforesaid extent.

10.10.2005 **(Jayant Patel, J.)**

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